

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

**H. THOMAS MORAN, II, Receiver of
the Assets of LifeTime Capital, Inc. and
Certain Affiliated Persons and Entities**

Case No. C-3-05-072

Plaintiff,

-vs-

DAVID W. SVETE,

**Judge Thomas M. Rose
Magistrate Judge Michael J. Newman**

Defendant.

DECISION AND ORDER OVERRULING DAVID W. SVETE'S OBJECTIONS (Doc. #178) TO MAGISTRATE JUDGE MICHAEL J. NEWMAN'S ORDERS REGARDING SVETE'S MOTION FOR LIST OF EX PARTE COMMUNICATIONS (Doc. #154), SVETE'S MOTION TO TAKE JUDICIAL NOTICE (Doc. #156), SVETE'S MOTION TO VACATE (Doc. # 160), SVETE'S REQUEST FOR JUDICIAL NOTICE (Doc. #161), SVETE'S MOTION FOR JUDICIAL NOTICE (Doc. # 170) AND PLAINTIFF'S MOTION TO STRIKE (Doc. #175); OVERRULING SVETE'S OBJECTIONS (Doc. #178) TO MAGISTRATE JUDGE MICHAEL J. NEWMAN'S REPORT AND RECOMMENDATIONS REGARDING ONE OF SVETE'S MOTION TO DISMISS (Doc. #145); ADOPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATIONS IN ITS ENTIRETY; DENYING SVETE'S MOTION TO DISMISS (Doc. #145) WITHOUT PREJUDICE; AND DENYING SVETE LEAVE TO APPEAL IN FORMA PAUPERIS

Now before the Court is the Order and Report and Recommendation issued by Magistrate Judge Newman on February 16, 2012. (Doc. #178.) Acting on the assumption that no objections were timely filed, the Court adopted the Report and Recommendations on March 9, 2012, (Doc. #179.) On March 12, 2012, Defendant David W. Svete filed objections to the Order and Report and Recommendations. (Doc. #180.) In response, the Court vacated its Order adopting the Report and Recommendations. (Doc. #182.)

The time has run and the Plaintiff has not filed a response to Svete's Objections. Svete's Objections are, therefore, ripe for decision.

OBJECTIONS TO THE ORDERS

The Magistrate Judge's decisions denying Svete's Motions (docs. # 154, 156, 160, 161 and 170) and denying Plaintiff's Motion (doc. #175) are non-dispositive orders. Federal Rule of Civil Procedure 72(a) provides that a district court must modify or set aside any part of a non-dispositive order that is clearly erroneous or is contrary to law. *American Coal Sales Co. v. Nova Scotia Power, Inc.*, No. 2:06-cv-94, 2009 WL 467576 at *13 (S.D. Ohio Feb. 23, 2009)(citing Fed. R. Civ. P. 72(a)). Thus, a "clearly erroneous" standard applies to factual findings made by the magistrate judge. *Id.* Legal conclusions are reviewed under the more lenient "contrary to law" standard. *Id.* Both of these standards provide considerable deference to the determinations made by the magistrate judge. *Id.* (citing *In re Search Warrants Issued August 29, 1994*, 889 F. Supp. 296, 298 (S.D. Ohio 1995)).

A magistrate judge's factual findings are considered clearly erroneous if, on the entire evidence, the court is left with the definite and firm conviction that a mistake has been committed. *Id.* The test is whether there is evidence in the record to support the magistrate judge's finding and whether the magistrate judge's construction of that evidence is reasonable. *Id.* (citing *Heights Community Congress v. Hilltop Realty Corp.*, 774 F.2d 135, 140 (6th Cir. 1985), cert. denied, 475 U.S. 1019 (1986)). A legal conclusion is contrary to law if the court determines that the magistrate judge's legal conclusions "contradict or ignore applicable precepts of law...." *Id.*(citing *Gandee v. Glaser*, 785 F. Supp. 684, 686 (S.D. Ohio 1992)).

The Court notes that there is a typographical error in the title of subpart IV of the Order and Report and Recommendations. (Doc. #178.) The title of subpart IV is “Defendant’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Plaintiff’s Motion To Strike Defendant’s Responsive Filing (Docs. 154, 161).” This title should refer to documents 145 and 175. Svete’s Motion To Dismiss is document 145 and Plaintiff’s Motion To Strike is document 175.

In support, the discussion under this subpart pertains to documents 145 and 175. Also, in footnote 4 of his Objections, Svete points out that the title of subpart IV mistakenly refers to his Motion To Dismiss as document 154 and the Plaintiff’s Motion To Strike and document 161. Yet, Svete goes on to discuss his objections to the Magistrate’s findings regarding document 145 and offers his comments on document 175.

In this case, this District Judge has reviewed the Magistrate Judge’s factual findings and finds that, notwithstanding the above referenced typographical error, they are not clearly erroneous. The District Judge has also reviewed the Magistrate Judge’s conclusions of law and finds that they do not contradict or ignore applicable law. Therefore, Svete’s Objections (doc. #180) to the Magistrate Judge’s Order (doc. #178) are OVERRULED.

OBJECTION TO REPORT AND RECOMMENDATIONS

As required by 28 U.S.C. §636(b) and Federal Rules of Civil Procedure Rule 72(b), the District Judge has made a de novo review of the record in this case. Upon said review, the Court finds that Svete’s Objections to the Magistrate Judge’s Report and Recommendations are not well-taken, and they are hereby OVERRULED. The Magistrate Judge’s Report and Recommendations regarding Svete’s Motion To Dismiss (doc. #145) is adopted in its entirety, notwithstanding the above referenced typographical error. Svete’s Motion To Dismiss (doc. #

145) is denied without prejudice and Svete is denied leave to appeal this decision in forma pauperis.

DONE and **ORDERED** in Dayton, Ohio, this Fourth Day of April, 2012.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Mr. Svete at his last address of record